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Insurance--Accident Policy--Total Disability as Excuse for Failure to File Notice and Proofs of Loss

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of the law[15] and carries to a logical conclusion the principle of liability for an officer's mistake in identity in making an arrest.

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INSURANCE — ACCIDENT POLICY — TOTAL DISABILITY AS EXCUSE FOR FAILURE TO FILE NOTICE AND PROOFS OF LOSS.[1] — *D* issued a life insurance policy to *P* which included a clause for indemnity for disability, and also a rider providing for double indemnity. *P* was injured in an automobile accident and rendered physically and mentally disabled for about ninety-seven days thereafter. The indemnity provisions were to the effect that notice of disability and proofs of loss should be filed within sixty days after disability. Because of his condition, *P* did not file notices and proofs within the time stipulated and *D* set this up as a defense to *P's* action on the policy. After judgment on the verdict for *P*, *D* obtained a writ of error. *Held*, that such disability of the insured was an excuse for the failure to file the notice and proofs of loss within the time provided in the accident and disability clause of the policy, and that the insurer was liable since notice and proofs were filed within a reasonable time after recovery. *Neill v. Fidelity Mutual Life Insurance Company*.[2]

Though there is respectable authority the other way,[3] this rule of law has been generally accepted as the better doctrine in such cases.[4] The rule is based on a variety of grounds, among others, that the insurance contract is one of adhesion and calls for a liberal

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[15] Vice v. Holly, 88 Miss. 572, 41 So. 7 (1906); Formwalt v. Hylton, 66 Tex. 288, 1 S. W. 376 (1886); POLLOCK, LAW OF TORTS 121-122; COOLEY, TORTS (3d ed. 1906) 316; but see Filer v. Smith, 96 Mich. 347, 55 N. W. 999 (1893).

[1] For a more complete discussion of the principles involved in this subject, see Haymond, *Physical or Mental Incapacity as an Excuse for Failure to Give Notice of Accident or Make Proof of Disability Required by Provisions of Accident and Life Insurance Policies* (1938) 5 INSURANCE COUNSEL JOURNAL, number 2, p. 15.

[2] 195 S. E. 860 (W. Va. 1938), Hatcher, J., dissenting.

[3] Egan v. N. Y. Life Ins. Co., 60 F. (2d) 268 (N. D. Ga. 1932); Whiteside v. North American Accident Ins. Co., 200 N. Y. 320, 93 N. E. 498, 35 L. R. A. (N. S.) 696 (1911).

[4] Haymond, *supra* n. 1; 33 C. J. 15; Note (1916) 14 R. C. L. 1333: "Failure to give notice is excused where the insured was disabled by an accident insured against to give the required notice, according to some courts, though good authority exists for the proposition that an insured is not relieved from the obligation imposed upon him by the terms of his policy to give notice, by himself or his representative, within a certain time of the commencement of his illness, by the fact that his illness is such as to render him delirious and unable to remember that he has the policy."

construction in favor of the insured,[5] and that courts abhor forfeitures.[6] Those courts denying recovery base their action on the sacredness[7] of contracts and that the parties intended the words to have that meaning requiring strict compliance.[8] It is probable that the *Neill* case lays down, for the first time in West Virginia, what is the majority rule with respect to disability as excusing notice and filing of proofs within the time specified in accident policies.

Counsel for *D* argued that the rule applicable to the *Neill* case was laid down in *Iannarelli v. Kansas City Life Insurance Company.*[9] In that case, the insured made default in the payment of an insurance premium which was essential to keep the policy in force. The policy provided for a waiver of payment of premiums in the event of disability upon due proof thereof. No proof as required by the terms of the policy was made, occasioned by the insanity of the insured, and upon suit by his committee for reinstatement of the policy, it was held that such disability was no excuse for failure to file proof. It was sought to distinguish this from the *Neill* case on the ground that the condition of the *Iannarelli* case was precedent and that of the *Neill* case was subsequent. The dissent argued that the words of the conditions in both cases were substantially similar, and regardless of whether subsequent or precedent, the conditions required the same treatment and if strict compliance was necessary in one it was likewise necessary in the other. However, it is suggested that the majority meant to do more than merely to label the two conditions subsequent and precedent, but further intended to adopt the theory of *New England Mutual Life Insurance Company v. Reynolds,*[10] that in accident cases the clause in question is in the nature of a condition subsequent wherein the insurer defends against a liability already accrued and collection by the insured on the policy is purely a matter of mechanics, whereas in cases involving a waiver clause, no liability on the policy has accured. In the latter case, the condition

[5] VANCE, INSURANCE (2d ed. 1930) 215: "To hold the insured strictly to terms in the choosing of which he had no part, and the meaning of which he often cannot understand, would often work gross injustice which the courts are loth to inflict."

[6] Comstock v. Fraternal Accident Ass'n, 116 Wis. 382, 93 N. W. 22 (1903).

[7] Egan v. N. Y. Life Ins. Co.; Whiteside v. North American Accident Ins. Co., both *supra* n. 3; Wheeler v. Connecticut Mutual Life Ins. Co., 82 N. Y. 543, 550-552, 37 Am. Rep. 594 (1880).

[8] Haymond, *supra* n. 1.

[9] 114 W. Va. 88, 171 S. E. 748 (1933).

[10] 217 Ala. 307, 116 So. 151 (1928).

on which the forfeiture may be based is not given as liberal a construction in favor of the insured as it would where the liability has already accrued, either in whole or in part.[11]

It is further suggested that there is another distinction for the purpose of justifying the *Neill* case, as the *Iannarelli* case is still law. In the former, it is the disability insured against that may defeat recovery by the insured, while in the waiver of premium cases, the disability involved is not insured against but may be taken advantage of by the insured as an excuse for nonpayment of premiums. In the former it would be manifestly unjust to say that the happening of the event insured against would defeat recovery,[12] and insurers would be unable to sell such policies.[13] Although the two rules are now well established in West Virginia, it is arguable that as the courts abhor forfeitures and construe liberally in favor of the insured, the impossibility should be an excusé in both cases, thereby permitting a similar recovery in the *Iannarelli* case.[14]

W. G. W.

PLEADING — PLEA IN ABATEMENT — GENERAL APPEARANCE. — Service of process on petitioner, defendant in a damage action, was voidable. Petitioner at rules filed his two pleas in abatement, one averring lack of jurisdiction in the trial court, the other setting up the defect in service of process. A demurrer to the first plea was sustained, and the second plea was overruled on motion. This is an original proceeding in prohibition by petitioner against the circuit judge to prohibit further prosecution of the action because of lack of jurisdiction. Writ of prohibition awarded. *Held*, that the filing of the pleas in abatement did not waive the defective service of process. *Morris v. Calhoun, Judge.*[1]

This case raises the question of when a plea in abatement will constitute a general appearance so as to waive defects in process. Consider first what is comprehended by the term "plea in abate-

[11] Pfeiffer v. Missouri State Life Ins. Co., 174 Ark. 783, 297 S. W. 847, 54 A. L. R. 600 (1927).

[12] Hayes v. Continental Casualty Co., 98 Mo. App. 410, 72 S. W. 135 (1903); 7 COOLEY, BRIEFS ON INSURANCE (2d ed. 1928) 5918.

[13] Haymond, *supra* n. 1.

[14] Swann v. Atlantic Life Ins. Co., 156 Va. 852, 159 S. E. 192 (1931); Johnson v. Mutual Life Ins. Co., 70 F. (2d) 41 (C. C. A. 4th, 1934), *per* Soper, Circ. J., wherein recovery was allowed.

[1] 195 S. E. 341 (W. Va. 1938).